DIVERSEY (FAR EAST) PTE. LTD.

v.

SERBA PAKAR KIMIA SDN. BHD.

HIGH COURT BORNEO
SYED AHMAD IDID JC
[SUIT NO. K. 1018 OF 1987]
17 SEPTEMBER 1991

CIVIL PROCEDURE: *Execution - Writ of seizure and sale - Whether execution proper and lawful - Issue - Whether contravened Exchange Control Act Order 47 r. 11 RHC 1980.*

This is an application to stay or set aside or strike out the writ of seizure and sale and the issues raised before the Court were that:

(a) its execution was irregular, defective, wrongful and an abuse of the process of Court;

(b) its execution was illegal and contravened the Exchange Control Act 1953;

(c) an application had been made earlier under O. 45 r. 11 for a stay of the judgment;

(d) the defendant/judgment debtor had filed an appeal to the Supreme Court; and

(e) the execution of the writ was *mala fide*.

The summons-in-chambers was applied for under O. 47 r. 1 which permits the stay of execution by writ of seizure and sale, if there are special circumstances which render it inexpedient to enforce the Judgment or order. It was also observed by the Court that O. 2 r. 1(i) was on the effect of non-compliance and that any irregularity shall not nullify the judgment or order. It was also observed that the said summons-in-chambers did not challenge the validity of the judgment or order.

Held:

[1] The Exchange Control Act does not prevent the payment by any person of any sum into any Court in Malaysia. If permission has not been obtained from the controller, the writ may still be issued directing the Sheriff to pay the proceeds of the execution into the Court.

[2] There is no need to go into the grounds that the plaintiff/judgment creditor knew of the appeal as r. 57 of the Rules of the Supreme Court is clear that an appeal shall not operate as a stay of execution of proceedings, that there was no *mala fide* because any steps taken in furtherance of a Court order cannot be so and that there was no abuse of the process of Court when obedience to a Court order is part and parcel of the legitimate course of action by the plaintiff/judgment creditor.

[Defendant's application dismissed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 45 r. 11

For the plaintiff - Nancy Tan; M/s. Shelley Yap Leong Tsue Chong Chia & Co.
For the defendant - Ronny Cham; M/s. Ronny Cham & Co.

JUDGMENT

Syed Ahmad Idid JC:

On 6 June 1991 the defendant/judgment debtor filed a summons-in-chambers and applied for several orders, that is:

(i) that the writ of seizure and sale be stayed, or set aside or struck out;

(ii) that the defendant's/judgment debtor's vehicle SA 9263 C be released and that the plaintiff/judgment creditor do pay damages: and

(iii) that costs be defendant's/judgment debtor's costs.

A certificate of urgency dated 29 May 1991 was filed and signed by one, Ooi Kim Ean.

The grounds advanced in the application to stay or set aside or strike out the writ of seizure and sale were that:

(a) its execution was irregular, defective, wrongful and an abuse of the process of Court;

(b) its execution was illegal and contravened the Exchange Control Act 1953;

(c) an application had been made earlier under O. 45 r. 11 for a stay of the judgment;

(d) the defendant/judgment debtor had filed an appeal to the Supreme Court; and

(e) the execution of the writ was *mala fide*.

The summons-in-chambers was applied for under O. 47 r. 11 which permits the stay of execution by writ of seizure and sale (O. 47 r. 1(a)) if there are special circumstances which render it inexpedient to enforce the judgment or order. Miss Nancy Tan was correct to observe that O. 2 r. 1(1) was on the effect of non-compliance and that any irregularity shall not nullify the judgment or order. It must, however, be added that the summons-in-chambers did not challenge the validity of the judgment or order.

Are there sufficient grounds for the Court to stay or set aside or strike out the writ of seizure and sale?

The judgment debtor not only applied to stay the execution but (and these are Not in O. 47 r. 1) asked also to have the writ of seizure and sale "set aside or struck out". In support was read out the affidavit by Chai Meng Ching @ Mickey Chai who is the director of the defendant judgment debtor's company. According to the certificate of urgency, the plaintiff had seized the defendant's/judgment debtor's Nissan Wagon Vehicle No. SA 9263 C on 25 May 1991.

Did this seizure render it inexpedient to enforce the Judgment or Order?

I cannot think so but let us see further the grounds which Counsel for judgment debtor had advanced:

(1) the judgment creditor did not comply with the Exchange Control Act in that it did not comply with s. 8 and 36 or of the Fourth Schedule clauses 1 and 3.

(2) as the written permission of the Controller of Foreign Exchange had not been obtained, no such writ can be sealed.

The short answers to both, based on the materials and evidence put before the Court, are that:

(i) the Exchange Control Act does not prevent "the payment by any person of any sum into any Court in Malaysia" (Fourth Schedule Clause 2). Section 8 of the Exchange Control Act prohibits **Persons** (bold for emphasis) from making payment to a person residing outside Malaysia. Plaintiff/judgment creditor is not such a **Person** but defendant/judgment debtor is. In any case, defendant/judgment debtor has not made any payment.

(ii) if permission has not been obtained from the Controller, the writ may still be issued directing the Sheriff to pay the proceeds of the execution into Court. Clause 1 of the Fourth Schedule is relevant. Then the Sheriff, in accordance with O. 46 r. 5, will give notice of any payment into Court to the party by whom the writ of execution was issued or to his solicitor. This, in my view, is sufficient to satisfy O. 46 r. 5(1). See also O. 47 r. 2(1).

(iii) There is no need to go into the grounds:

(a) that plaintiff/judgment creditor knew of the appeal as r. 57 of the Rules of the Supreme Court is clear that "an appeal shall not operate as a stay of execution of proceedings ..." (see also s. 73 of the Courts of Judicature Act 1964 in similar strain); or

(b) that there was *mala fide* because any steps taken in furtherance of a Court order cannot be so; or

(c) that there was abuse of the process of Court when obedience to a Court order is part and parcel of the legitimate course of action by the plaintiff/judgment creditor.

I accepted that when the plaintiff/judgment creditor executed the judgment, it complied with the Rules of the High Court as it used the proper forms and by the conditions of Sale expressly stating that the proceeds of sale of the said vehicle shall be paid into Court. The execution, therefore, cannot be illegal. In any case, the seizure was made by the Sheriff. I can add that before the money can be released to the plaintiff/judgment creditor, the requisite permission should be obtained in accordance with O. 22 r. 19 of the Rules of the High Court 1980.

I therefore dismiss defendant's/judgment debtor's summons-in-chambers dated 6 June 1991 with costs.

Also found at [1992] 2 CLJ 810